(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

Joseph A. O'Toole,

Petitioner

v.

Northrop Grumman Corporation

Respondent

On Petition For Writ Of Certiorari
To The United States Court
of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

After several appeals, the critical remaining issue was post-trial damages from the loss of the plaintiff's 401k fund in this employee contract matter. Post-trial damages were not an issue at the original trial. They only arose as a direct result of the court's many errors. The plaintiff requested a trial on his post-trial damages in order to prove these. To show the court there was good reason to grant his request, he provided documentation of what he did with his current employer's 401k. These show he would have changed 401k funds during the post-trial period. The court denied a hearing and opined, as the Tenth Circuit Court noted, based only on the evidence at the 2003 trial, that there was no evidence he would have changed funds. The court had indisputable documentation to the contrary.

The Court awarded post-trial damages based on speculation. The plaintiff has never had a trial on his post-trial damages.

1) Whether the plaintiff was denied due process by the court's failure to conduct a supplemental trial on post-trial damages?

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The opinion and order of the United States District Court of New Mexico, summary judgment in favor of the Defendant, filed on December 18, 2000.

The opinion and order of the United States Court of Appeals for Tenth Circuit, filed on October 21, 2002, finding err and remanding (O'Toole I.

The opinion and order of the United States District Court of New Mexico, filed on June 20, 2003, after the May 2008 trial, finding no breach of contract.

The opinion and order of the United States Court of Appeals for Tenth Circuit, filed on October 21, 2002, finding multiple err including having already found Northrop Grumman breached in O'Toole I and remanding for parsing of all damages (O'Toole II).

The opinion and order of the United States District Court of New Mexico, filed on May 23, 2005.

The opinion and order of the United States Court of Appeals for Tenth Circuit, finding multiple err and remanding, filed on September 19, 2007 (O'Toole III).

The opinion and order of the United States District Court of New Mexico, filed on December 31, 2008, is reprinted in the Appendix hereto, pp. 7-18.

The opinion of the United States Court of Appeals for Tenth Circuit, filed on February 5, 2010, finding multiple err and remanding but not finding for the Plaintiff on the issues relevant to this petition (O'Toole IV), is reprinted in the Appendix hereto, pp. 19-34.

The order of the Tenth Circuit denying a rehearing, filed on March 3, 2010, is reprinted in the Appendix hereto, pp. 35.

JURISDICTION

The judgment of the court of appeals was issued on February 5, 2010, Pet. App. pp. 19-34. Petitioner's timely petition for rehearing was denied on March 3, 2010, Pet. App. p. 35. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Right To Fundamental Fairness

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of** life, liberty, or **property, without due process of law**; nor shall private property be taken for public use, without just compensation. (emphasis added)

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Mr. O'Toole was a long-term employee of the Grumman Aerospace Corporation and then, after the merger, Northrop Grumman Corporation (NG). Mr. O'Toole was reassigned from San Diego, CA, to Los Alamos, NM, and was entitled to the relocation benefits of the Grumman policy upon completion of his assignment. NG breached, did not provide the benefits it should have, and did not fully pay what it should have for his relocation.

Mr. O'Toole finally used all of his 401k plan to pay what NG should have paid along with taxes and penalties.

Mr. O'Toole's complaint requested damages for this breach of contract.

B. The District Court And Appellate Court Proceedings

After summary judgment in favor of the defendant and appeal (O'Toole I), a judge trial was held in May 2003 finding no breach of contract.

Mr. O'Toole appealed (O'Toole II) and the 10th Circuit found multiple errors. This second appeal opinion points out that their first appeal opinion (O'Toole I) is the law of the case and that they had found a breach had occurred. So the trial should have been for determination of the damages.

Upon remand, Judge Strom wrote the parties and asked for suggestions on how to proceed. Mr. O'Toole asked for a hearing on the

damages. Judge Strom ordered briefs and Mr. O'Toole was awarded damages including amounts for the taxes and penalties on his forced 401k withdrawals. Judge Strom was to also award lost 401k earnings but he said there was not enough evidence to award them.

Mr. O'Toole appealed (O'Toole III) and the 10th found multiple errors. These included not taking the mandatory judicial notice of the NG 401K website with the performance of each of the funds Mr. O'Toole could have chosen, had he still had money left in the 401k, for all of the years of interest.

The District Court was left with determining damages including the lost earnings of the 401k between the time of the 2003 trial and present. To determine the amount of these lost earnings, a determination of what 401k funds Mr. O'Toole would have used since May 2003 had to be made.

The District Court ordered briefs. Mr. O'Toole asked in his May 2008 opening brief for a trial on his post-trial damages.[1] These damages only arose due to the court's mistakes. He discussed documents he provided to show that there was good cause to hold a trial.

Mr. O'Toole provided these documents to support his arguments on what funds he would have used. These documents included a print out showing what fund Mr. O'Toole used in his current employer's 401k during the post-trial period.[2] He included a printouts of the details of his current

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[1] Pet. App. I pp. 2-6.

[2] Pet. App. II p. 1.

employer's fund he used and of the NG 401k fund he said in his brief he would have used during the post-trial period to show they were equivalent.[3] He included reports prepared post-trial from his and NG's accountants that discussed mostly his post-trial damages. A small portion of these reports dealt with pre-trial damages so that a total damage award could be calculated.

The District Court denied Mr. O'Toole a hearing without comment.

The District Court, despite both parties arguing to the contrary, opined that there was no evidence that Mr. O'Toole would have changed 401K investment funds. As the Tenth Circuit notes in its opinion, the District Court used only the evidence from trial in May 2003 to form his opinion on what Mr. O'Toole would have done with his 401k investment choices during the post-trial period.

Judge Strom's opinion that there is no evidence that Mr. O'Toole would have changed funds is based only on evidence from the trial. This evidence was available to him and Judge Strom could have reached this opinion after the second appeal but instead opinioned that there was not enough evidence to make any decision. After remand to make a decision while taking mandatory judicial notice of the 401k information on the Defendant's website which he had failed to do, he did not consider this information and based his decision on information only available at trial that in his earlier opinion he failed to find sufficient to make any decision.

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[3] Pet. App. I pp. 4-6 and 7-12.

The trial court determined there are post-trial damages for lost 401k earnings and made an award for them after denying him his due process right to be heard on his post-trial damages.

Mr. O'Toole appealed (O'Toole IV) and the 10th Circuit found multiple errors. However, it did not find error concerning the denial of a hearing.

Mr. O'Toole's Petition for Reconsideration was denied without comment.

Mr. O'Toole now petitions for a writ of certiorari so that he can be heard on his post-trial damages.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Review Is Warranted Because the Opinions by the Tenth Circuit and the District Court Conflicts with the Plaintiff's Due Process Rights.

The Fifth Amendment's guarantee of due process is applicable to actions of the federal government including the judiciary. Civil cases are generally governed by explicit guarantees of procedural rights under the Bill of Rights. Among those rights is the constitutional right to procedural due process, which has been broadly construed to protect the individual so that statutes, regulations, and enforcement actions must ensure that no one is deprived of "life, liberty, or property" without a fair opportunity to affect the judgment or result.

Mr. O'Toole was denied due process. The trial court determined that post-trial damages were due and, using a flawed process, awarded them.

The trial court denied Mr. O'Toole's request for a hearing to determine these damages thus denying him a fair opportunity to affect the judgment or result. Instead, the trial court awarded these post-trial damages using evidence admitted to prove only pre-trial damages when relevant evidence was available.

At a basic level, procedural due process is essentially based on the concept of "fundamental fairness." In 1934, the United States Supreme Court held that due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".[4] As construed by the courts, it includes an individual's right to be adequately notified of charges or proceedings, the opportunity to be heard at these proceedings, and that the person or panel making the final decision over the proceedings be impartial in regards to the matter before them.[5]

Mr. O'Toole was denied his fundamental right to be heard on his post-trial damages when the trial court made a decision without conducting a trial on his post-trial damages. This action denied Mr. O'Toole fundamental fairness.

The post-trial damages arose as a result of the trial court's many previous errors in what are now three post-trial appeals. Mr. O'Toole has never been given a trial on these post-trial damages. This

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[4] *Snyder v. Massachusetts*, 291 U.S. 97, 105; , 54 S.Ct. 330; 78 L.Ed. 674 (1934)

[5] *Goldberg v. Kelly*, 397 U.S. 254, 267; 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)

is fundamentally unfair and a violation of due process.

The trial court determined there are post-trial damages for lost 401k earnings and has made an award for them. So this was not a matter if damages were due but one concerning what the amount of those damages should be. Mr. O'Toole did not merely ask for a hearing, he provided documents that show there was good reason to hold a hearing. When the court said that there was no evidence that he would have changed 401k funds during the post-trial period, it had before it information that there was evidence available but denied him a hearing to present it. Having found that post-trial damages arising only due to the court's mistakes were due, the court had a constitutional obligation to hear Mr. O'Toole on these damages. By not doing so, it abused its discretion and denied him due process.

The 10th Circuit knew all of this and even had the same indisputable documents the trial court had when it formed its flawed opinion. The 10th Circuit opinion perpetuated the unfair opinion of the trial court that denied due process and was itself lacking fundamental fairness by not remanding for a trial on the post-trial damages.

Review is warranted because the 10th Circuit's opinion is a clear violation of the plaintiff's rights to fundamental fairness and due process.

II. Review Is Warranted Because the Opinion by the Tenth Circuit Conflicts with an Opinion of the Eleventh Circuit.

The Eleventh Circuit, in *Welborn v. Reynolds Metals*,[6] a case similar to ours, remanded for a hearing on post-trial damages. The 11th Circuit said, "It was simply impossible for plaintiff to be able to prove these post-trial backpay damages at the time of the original trial. The district court erred in refusing to allow plaintiff to present evidence supporting a backpay award for the time period after the original trial until the time of her reinstatement."[7]

Similarly, post-trial damages in our case were irrelevant as well as impossible to prove. At trial it was not reasonable to expect that there would even be post-trial damages. The matter was expected to end at trial with an award of the pre-trial damages. It was only because of the mistakes the court made that the damages continued to accrue.

The 10th Circuit found no error on the trial court's part concerning the denial of a hearing on the post-trial damages. In fact the 10th Circuit's opinion does not even acknowledge that Mr. O'Toole had limited his request to be heard to just the post-trial period. It is clear the 10th Circuit did not appreciate this important distinction because they discussed how at least some of the new evidence could have been presented at trial but

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[6] 868 F.2d 389 (11th Cir. 1989)

[7] *Ibid.* p. 391

erroneously inferred it was tendered to address pre-trial damages.[8] The 10th Circuit does not address the vast majority of the documents that were only available post-trial, documents that go directly to the question that turned out to be critical whether Mr. O'Toole would have changed funds in the post-trial period.

The 10th Circuit notes that they had previously remanded, as Mr. O'Toole had appealed, for the court to take the mandatory judicial notice of the NG 401k funds on the NG website.[9] The court made its decision on what fund to use without taking notice of this information but instead only considered evidence from the May 2003 trial to decide on the post-trial damages it awarded.

Also, the 10th Circuit opinion does not address Mr. O'Toole having told the trial court in his May 2008 brief what fund he would then choose to use. Mr. O'Toole even provided a printout of his current employer's 401k showing that he was actually using the equivalent bond fund.[10] He should have been allowed at least that he would have used that fund from that date onward.

Further, the 10th Circuit does not address the fact that he told the 10th Circuit in his opening brief to them what fund he would then use from that date onward.

On at least two occasions Mr. O'Toole told the courts prospectively that he would change funds, and the courts ignored him.

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[8] Pet. App. I p. 26.

[9] Pet. App. I p. 26.

[10] Pet. App. II p. 17 and pp. 13 16.

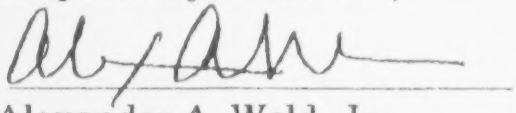
Review is warranted because the 10th Circuit's opinion is adverse to that of the 11th Circuit .

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Tenth Circuit Court of Appeals on the matter of remanding for a trial on post-trial damages.

Dated: April 28, 2010

Respectfully submitted,



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PETITION FOR A WRIT OF CERTIORARI
APPENDIX VOLUME I

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EXTRACT OF O'TOOLE'S BRIEF-IN-CHIEF TO THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH A. O'TOOLE,
Plaintiff,

vs. CIV NO. 99-1426
LH/RLP

NORTHROP GRUMMAN CORP.,
Defendant.

PLAINTIFF'S POST-TRIAL MEMORANDUM ON DAMAGES

This case is over a failure by Northrop Grumman (NG) to provide relocation benefits and to pay relocation expenses it owed its employee, Joseph O'Toole. Mr. O'Toole moved to Los Alamos from San Diego in 1996 as an employee of NG. NG was to provide relocation benefits and pay relocation expenses. There was a dispute over which expenses were covered and how the move was to be handled. The upshot of that was that NG refused to provide the benefits it acknowledged were due and to pay for certain expenses, even the ones it conceded it

owed, unless Mr. O'Toole would drop his claim for the contested expenses. Mr. O'Toole asked NG to pay the conceded expenses while the contested expenses were resolved because the only source he had for payment of these on-going expenses was his retirement fund, the Northrop Grumman Savings Investment Plan (SIP), and he did not want to do that if he could avoid it. He told NG he would have to fund the expenses out of his SIP and begged NG to pay at least those expenses. NG refused and Mr. O'Toole ended up stripping his entire retirement savings to pay the expenses.

This case has been tried twice and gone up on appeal three times. The 10th Circuit repeatedly said that NG had to reimburse Mr. O'Toole for the loss of the retirement savings, that is, his lost earnings including lost earnings on the earnings, and certain other items. NG has paid some of these, including the original uncontested expenses, but there are a number of damage claims that remain outstanding especially the lost earnings from the retirement savings.

The 10th Circuit has sent the case back with instructions to reassess various damages.

Additional limited testimony needs to be taken and a reply made to Defendant's brief

The Plaintiff strongly believes that this matter cannot be resolved with just the simultaneous submission of these briefs and taking judicial notice of the Northrop Grumman fund returns. We are now five years past the time of the first trial. The 10th Circuit directed this Court to make determinations as to what Mr. O'Toole would have done with his investments over the last years. For

this Court to do that the Court must hear from Mr. O'Toole. The Plaintiff believes that the passage of time between 2003, when this matter was originally tried, and now require the Court to solicit limited supplemental testimonial evidence from Mr. O'Toole, and from the Defendant's and the Plaintiff's accountants to assist the Court in making its decision. The case is more complicated now because of the turns and twists of the stock market, and we now can present evidence concerning the Plaintiff's retirement investment pattern over the last five years. This would assist the Court determine what Mr. O'Toole would have done between the trial and now as the 10th Circuit directed.

Mr. O'Toole has retained a firm, Vaughn Group LLC, to help sort through these calculations to estimate the loss as related to the withdrawal of funds, and help him develop his demonstratives showing how one determines his SIP-related damages including gross up. The Vaughn report[1] only addressed the SIP related items. It does not address other non-SIP related items like the lost mortgage deduction damages and it therefore does not have all items in its total estimate amount.

The Vaughn Report was sent to NG. NG's accountant used the Vaughn report to prepare his own report.[2] Later Mr. O'Toole with the help of Mr. Vaughn replied to the Howard report. The Vaughn Group assigned two people who are investment experts and a CPA, see the report for their

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[1] Exhibit 1.

[2] Exhibit 17.

qualifications. The investment experts were only given the SIP information concerning the particular funds that made up the SIP, that is the choices, and the fact that Mr. O'Toole had his money in the US Equity Fund for the first three of the twelve years. Mr. O'Toole was interviewed and an investment profile was determined making use of standard tests. They were tasked to determine which funds Mr. O'Toole "more likely than not" would have invested in and over what periods of time. Mr. O'Toole notes that the money he has in his current employer savings plan[3] that is similar to the SIP[4] is invested in the same fund that the financial experts determined he would "more likely than not" have chosen in the SIP during the past several years. The CPA then determined the amounts based on the investment experts' determination.

This testimony would be brief and would require less than a day of additional trial time and would greatly assist the Court in reaching a fair resolution of this matter. In fact, given the passage of time since the 2003 trial, it is inconceivable that the Court could reach a fair resolution without hearing from the parties again, hearing from the accountants, and receiving the testimony in a more logical and reasoned manner.

We expect that in a hearing the basic data to be used for the calculations and the decisions would be in agreement. This process would more clearly

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[3] Exhibit 2 and 3.

[4] Exhibit 4.

highlight the disagreements and greatly simplify the court's task.

In any case, the services of a CPA to calculate the damages and address the tax laws while considering the relevant case law on how to determine the extent of the damages would assist the Court in making its findings and deciding this case.

The Plaintiff also believes that the simultaneous submission of trial briefs by the parties will not provide a fair determination. The Plaintiff requests that he be allowed to provide this Court a reply to Defendant's brief. Throughout these lengthy proceedings, the Defendant has repeatedly advanced unsound and losing arguments that have been reversed on appeal.. The Plaintiff should be given the opportunity to point out to the Court the fallacies he believes will present in Defendant's brief. Plaintiff requests this Court allow him to reply to Defendant's brief.

Balance of brief omitted as not relevant to this Petition.

OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH O'TOOLE	)	
	)	
Plaintiff,	)	CIV 99-1426
ln/RLP		
	)	
v.	)	
NORTHROP GRUMMAN.,	)	MEMORANDUM
	)	OPINION
Defendant.)		
_____)		

This matter is before the Court on remand from the United States Court of Appeals for the Tenth Circuit. This is the third remand of this case. (See Filing Nos. 56, 83, and 98.) Only the following four issues[5] remain to be considered by the Court:

(1) Whether O'Toole is entitled to an award based on his loss of a mortgage interest deduction; and if so in what amount.

(2) What O'Toole's lost earnings and lost earnings on earnings are.

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[5] Plaintiff's brief contains a suggestion the record should be reopened for the receipt of more evidence. This suggestion is rejected by the Court.

(3) Elaboration of this Court's reasoning for its denial of O'Toole's claim for prejudgment interest on $2,000.00 of lost home equity.
(4) Determination of which of O'Toole's damages awards are subject to gross-up and which are not.

For detailed recitations of the facts of this case, see Filing Nos. 56, 78, 83, 88, and 98.

Discussion

A. Lost Mortgage Interest Deduction

The Court previously determined that O'Toole lost his mortgage interest tax deduction from July 1, 1997, through September of 1998, a period of fifteen (15) months. (Filing No. 88, at 10.) In a prior opinion, the Court held that, although it was satisfied that O'Toole had sustained some damage by way of having to pay more income tax than he otherwise would have paid commencing in mid-1997, it was virtually impossible to calculate the amount of that damage. (See Id.) The Court of Appeals disagreed, concluding that because a minimum award was supportable by the evidence, a denial based solely on the speculative nature of the calculation was inappropriate. (See Filing No. 98, at 10.) Upon remand , the parties have substantially agreed upon the value of O'Toole's lost mortgage deduction and associated taxes, but not on whether O'Toole should recover on the claim. (See generally, Filing Nos. 114 at 9-15, 115 at 4-8.) Moreover, the Court of Appeals has concluded that the evidence could support a minimal award. (See Filing No. 98, at 10.) It thus requires no

speculation for the Court to find that the value of the lost mortgage interest deduction and associated taxes is $17,600.00 and that $7,040.00 of this amount was incurred in the period ending June 30, 1997, while $10,560.00 was incurred in the period ending December 31, 1998.

Northrop Grumman argues that the Court should not award damages for the lost mortgage interest deduction because O'Toole failed to mitigate damages by buying new cars, taking vacations, and making educational payments. However, there is evidence that O'Toole purchased his cars before the dispute with Northrop Grumman arose and no evidence that the vacation he took was anything but a modest one. This Court previously found that "[w]ith all of the expenses other than relocation, that [O'Toole] was facing, he would have most certainly had to withdraw funds from his SIP." (Filing No. 88, at 14.) The Court sees no reason to disturb that finding today. O'Toole acted reasonably in withdrawing from his SIP to cover his lost mortgage interest deduction and Northrop Grumman cannot avoid liability on the basis of failure to mitigate.

B. Lost Earnings and Lost Earnings on Earnings

The Court of Appeals remanded this claim so this Court can determine an award of earnings and earnings on the unpaid earnings. (Filing No. 98, at 16.) This Court has also been directed to take judicial notice of proof of earnings after 1999 from Northrop Grumman's website, to consider whether 12% is a reasonable average for all years for lost earnings and earnings on earnings, and to consider

whether O'Toole would have left his money invested in the U.S. Equity Fund. (Id.)

As an initial matter, the Court reviews its previous findings. In 1996, O'Toole was forced to withdraw $15,230.00 from his SIP dic to Northrop Grumman's failure to pay his unreimbursed expenses. (Filing No. 88, at 8.) In 1998, O'Toole was similarly forced to withdraw $13,400.00. (Id. At 8-9.) In order to arrive at those amounts, O'Toole lost $30,770.00 in 1996, and $26,400.00 in 1998. The Court also notes that O'Toole is entitled to payment of $7,040.00 in the period ending June 30, 1997, and $10,560.00 in the period ending December, 31, 1998. *See supra*. Northrop Grumman made payments to O'Toole on the amount of $28,230.00 during the period ending December 31, 2001, and $31,970.00 during the period ending December 31, 2005. The Court finds that its calculations should be based on quarterly periods with interest compounded accordingly.

A significant question in determining what interest rate to apply is which fund or funds O'Toole would have selected had his money remained in the SIP. Although O'Toole argues that he would have actively managed his portfolio, moving his money to higher performing funds, there is no evidence to support this. During the time the SIP was funded, O'Toole never switched between the investments he initially selected. Northrop Grumman suggests that the Court should average the yields of all the funds in the SIP, but there is no evidence that O'Toole would have purchased all the available funds in equal shares. O'Toole had a selection of funds to choose from

when he joined the SIP and he chose only two of the may available. Although the question before the Court is inherently speculative, neither party offers reasoning grounded in the facts. The Court finds that O'Toole kept is money in two funds in the SIP: the U.S. Equity Fund and the Equity Growth (Magellan) Fund. The Equity Growth (Magellan) Fund has been discontinued. The Court of Appeals noted that "[i]t seems reasonable to assume that Mr. O'Toole would have left his money invested in [the U.S. Equity Fund] after the other fund in which he was invested was discontinued." (Filing No. 98, at 15.) This Court agrees.

The next question is what interest rate the U.S. Equity Fund would have yielded. Pursuant to the direction of the Court of Appeals, this Court takes judicial notice of the proof of earnings after 1999 from Northrop Grumman's website. Northrop Grumman Saving Plan Performance Update 1 (September 30, 2008), http://benefits.northropgrumman.com/Savings/Savings%20Plan%20Perfprmance/Pages/default.aspx. The average rate of return over ten years on the U.S. Equity Fund is 4.5% and the Court finds that the interest on O'Toole's claim should be calculated at that rate. Accordingly, the Court finds that O'Toole's suggestion that 12% is a reasonable average interest rate for all years for lost earnings and earnings on earnings lacks merit.

Taking account of the factors discussed above, the Court makes the following calculations :

Period Ending	Beginning Amount	Adjustments	Earnings	Ending Amount Owed

	Owed			
6/29/1996	$0.00	$30,770.00	$0.00	$30,770.00
9/30/1996	$30,770.00		$346.16	$31,116.16
12/31/1996	$31,116.16		$350.06	$31,466.22
3/31/1997	$31,466.22		$353.99	$31,820.21
6/30/1997	$31,820.21	$7,040.00	$357.98	$39,218.00
9/30/1997	$39,318.19		$441.20	$39,659.40
12/31/1997	$39,659.40		$446.17	$40,105.56
3/31/1998	$40,105.56	$10,560.00	$451.19	#51,116.75
6/30,1998	$51,116.75		$575.06	$51,691.82
9/30/1998	$51,691.82		$581.53	$79,261.42
12/31/1998	$52,273.35	$26,400.00	$588.08	$79,261.42
3/31/1999	$79,261.42		$891.69	$80,153.11
6/30/1999	$80,153.11		$901.72	$81,054.84
9/30/1999	$81,054.84		$911.87	$81,966.70
12/31/1999	$81,966.70		$922.13	$82,888.83
3/31/200	$82,888.		$932.5	$83,821.

0	83		0	33
6/30/2000	$83,821.33		$942.99	$84,764.32
9/30/2000	$84,764.32		$953.60	$85,717.92
12/31/2000	$85,717.92		$964.33	$86,682.24
3/31/2001	$86,682.24		$975.18	$87,657.42
6/30/2001	$87,657.42		$986.15	$88,643.57
9/30/2001	$88,643.57		$997.24	$89,640.81
12/31/2001	$89,640.81	($28,230.00)	$1,008.46	$62,419.26
3/31/2002	$62,419.26		$702.22	$63,121.48
6/30/2002	$63,121.48		$710.12	$63,831.60
9/30/2002	$63,831.60		$718.11	$64,549.70
12/31/2002	$64,549.70		$726.18	$65,275.89
3/31/2003	$65,275.89		$734.35	$66,010.24
6/30/2003	$66,010.24		$742.62	$66,752.86
9/30/2003	$66,752.86		$750.97	$67,503.83
12/31/2003	$67,503.83		$759.42	$68,263.24
3/31/200	$68,263.		$767.9	$69,031.

4	24		6	21
6/30/2004	$69,031.21		$776.60	$69,807.81
9/30/2004	$69,807.81		$785.34	$70,593.14
12/31/2004	$70,593.14		$794.17	$71,387.32
3/31/2005	$71,387.32		$803.11	$72,190.42
6/30/2005	$72,190.42		$812.14	$73,002.57
9/30/2005	$73,002.57		$821.28	$73,823.85
12/31/2005	$73,823.85	(31,970.00)	$830.52	$42,684.36
3/31/2006	$42,684.36		$480.20	$43,164.56
6/30/2006	$43,164.56		$485.60	$43,650.16
9/30/2006	$43,650.16		$491.06	$44,141.23
12/31/2006	$44,141.23		$496.59	$44,637.82
3/31/2007	$44,637.82		$502.18	$45,139.99
6/30/2007	$45,139.99		$507.82	$45,647.82
9/30/2007	$45,647.82		$513.54	$46,161.36
12/31/2007	$46,161.36		$519.32	$46,680.67
3/31/200	$46,680.		$525.1	$47,205.

8	67		6	83
6/30/2008	$47,205.83		$531.07	$47,737.89
9/30/2008	$47,737.89		$537.04	$48,273.93
12/31/2008	$48,273.93		$543.08	$48,817.02

Accordingly, as of this date, the Court finds that Northrop Grumman should pay O'Toole $48,817.02 for his loss of mortgage interest deduction and for his lost earnings and earnings on earnings.

C. Claim for Prejudgment Interest on Award for Lost Equity

The Court of Appeals remanded this issue for further elaboration as to why the Court failed to grant the plaintiff prejudgment interest. In the Court's opinion filed May 23, 2005 (Filing No. 88), the Court made the following finding:

> The other consequential damage claim he might have in connection with the one year delay after June of 1997 would be the increase in equity that he would have built up during the time, had he been able to purchase a house at the end of the one-year period. At the most this would amount to $2,000 or less
>
> ....

This determination of $2000 was premised on actual mortgage payments which the plaintiff made at a later date when he did purchase a house. The amount was not in any way liquidated or settled at the time the plaintiff purchased his home in 1998, and of course, we have no evidence as to

what he actually would have paid during the period of 1997-98, resulting in an increase in the equity in his home. As this was essentially an estimate based upon subsequent events, the Court concluded that it would be unfair to grant the plaintiff prejudgment interest on that amount. *Wickham Constr. Cp. V. Local Union No. 3, Int'l Bhd. Of Elec. Workers*, No. 74 CIV. 3248, 1991 WL 84595, at *1 (S.D.N.Y. May 15, 1991) (quoting *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77, 87 (2d Cir. 1980)), *aff'd* 955 F.2d 831 (2nd Cir. 1992).

D. Gross-Up

This issue was remanded for consideration in order that the parties can explain to this Court whether O'Toole's damage awards are taxable and whether they replace monies that would not have been taxable.

The $2,000 award for loss of home equity is a non-taxable event, and accordingly, it is not subject to being grossed up. The other damages which have been awarded in this opinion are admittedly consequential damages. The plaintiff has testified that consequential damages are not subject to being grossed up (Trial Tr. 180-181). In addition, in his testimony on page 319 of the trial transcript he testified as follows:

Q. That's one thing you are not seeking gross up on.

A. Correct.

Q. But the rest of these are

A. Yes.

Q. And you base that on the company's policy to gross you up on relocation expenses; correct?

A. Yes.

Q. Bit some of these are consequential damages, aren't they?

A. Quite a few of them are, yes.

Q. There is no policy at Northrop Grumman to gross you up on consequential damages, is there, Mr. O'Toole?

A. Not to consequential damages.

In addition to that testimony, he further testified to a "green sheet" which was an itemization of the damages he was claiming as reflected in the exhibits received in evidence. Among these was Exhibit 11 for some $88,000 plus, which was made up of the four withdrawals from his Northrop Grumman Savings and Investment Plan, which totaled that amount. On Pages 320-322 of the transcript, he testified that the damages he was seeking should not include a gross-up on those amounts. The awards of damages in this order do not include taxable amounts, and indeed, include amounts which the plaintiff has testified were not subject to being grossed up. For these reasons, the Court finds that the amounts involved are not subject to gross up.

Conclusion

The Court finds that plaintiff is entitled on Issues A and B to recovery in the amount of $48,817.02; that no prejudgment interest is die on the $2,000 award for the reasons stated, and that the amounts involved in this order are not subject to gross-up. A separate order will be entered in accordance with this memorandum opinion.

DATED this 31st day of December, 2008.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court

10TH CIRCUIT OPINION

JOSEPH O'TOOLE, Plaintiff-Appellant,
v.
NORTHROP GRUMMAN CORP., Defendant-Appellee.
No. 09-2018.
United States Court of Appeals, Tenth Circuit.
February 5, 2010.

(D.C. No. 1:99-CV-01426-LH-RLP), (D.N.M.)

Before MURPHY, McKAY, and BALDOCK, Circuit Judges.

ORDER AND JUDGMENT*

MONROE G. McKAY, Circuit Judge.

This is the fourth appeal concerning Mr. O'Toole's claims for damages arising out of Northrop Grumman Corporation's breach of a contract to pay his relocation expenses from San Diego, California to Los Alamos, New Mexico. See O'Toole v. Northrop Grumman Corp., 499 F.3d 1218 (10th Cir. 2007) (O'Toole III); O'Toole v. Northrop Grumman Corp., 113 F. App'x 314 (10th Cir. 2004) (O'Toole II); O'Toole v. Northrop Grumman Corp., 305 F.3d 1222 (10th Cir. 2002)

(O'Toole I). We have jurisdiction over this diversity action under 28 U.S.C. § 1291. We affirm in part and reverse and remand in part.

I. Background

Mr. O'Toole was an employee of Northrop Grumman in 1996 when he was transferred from his position in San Diego, California, to a position in Los Alamos, New Mexico. Northrop Grumman initially refused to reimburse Mr. O'Toole for some of his relocation expenses. As a result, Mr. O'Toole withdrew money from his Northrop Grumman Savings and Investment Plan ("SIP") in 1996 and 1998 to cover those expenses. Mr. O'Toole incurred taxes and penalties for making these early withdrawals from his SIP account.

Mr. O'Toole filed an action for breach of contract in 1999. He sought direct damages, consequential damages, and punitive damages for Northrop Grumman's failure to pay the relocation expenses. In 2000, the district court granted summary judgment in favor of Northrop Grumman on all claims, although Northrop Grumman had only moved for partial summary judgment on Mr. O'Toole's claims for consequential damages. Mr. O'Toole appealed, and we reversed. In 2001, while the first appeal was pending, the parties settled some of the claims for direct damages.

In 2003, the district court held a bench trial solely on the issue of damages because Northrop Grumman had conceded that it had breached the contract with respect to reimbursement of certain relocation expenses. The claims at issue for trial

were the remaining claims for direct damages that had not been resolved by the settlement, all of the claims for consequential damages, and the claim for punitive damages. At the conclusion of the trial, the district court entered judgment in favor of Northrop Grumman on all claims. Mr. O'Toole appealed.

In O'Toole II, we affirmed in part and reversed in part the district court's decision denying all claims for relief. We affirmed the district court's decision denying Mr. O'Toole's claim for direct damages and his claim for punitive damages. We reversed the district court's decision denying all of Mr. O'Toole's claims for consequential damages,1 and we remanded "for entry of an award of consequential damages that includes at least an amount reimbursing the penalties paid and interest lost on the funds Mr. O'Toole was forced to withdraw from his retirement account to pay for undisputed relocation costs." O'Toole II, 113 F. App'x at 319. We further directed the district court to "consider all other claims for consequential damages and make specific findings as to each claim." Id.

On remand, Mr. O'Toole filed a post-trial brief on damages in which he separated his consequential damages claims into four categories: (1) "basic consequential damages"; (2) "gross-up" on the basic consequential damages; (3) "lost earnings from [the SIP funds]"; and (4) "gross-up" on the SIP damages. See Aplt. App., Vol. V at 957. The bulk of Mr. O'Toole's basic consequential damages related to his inability to purchase a home during his second year in Los Alamos because he was waiting for Northrop Grumman to reimburse his relocation

expenses. Those damages included: moving expenses for moving between rental homes that year; additional taxes from having no mortgage deduction that year; and the value of principal payments he was unable to make during that year because he was paying rent instead of paying principal towards a mortgage on his own home. Also included in his basic consequential damages were the taxes and penalties he had to pay on the withdrawals from his SIP account. Mr. O'Toole sought as a separate category of damages the earnings he would have accrued on his SIP funds, if he had not had to withdraw them to pay for relocation expenses. Finally, Mr. O'Toole requested that the district court gross-up2 his basic consequential damages and his SIP damages.

After Northrop Grumman filed its response and Mr. O'Toole filed his reply, the district court entered judgment in favor of Mr. O'Toole in the amount of $31,970, which represented awards of damages for taxes and penalties on the SIP withdrawals in 1996 and 1998, with prejudgment interest; and $2,000 to account for principal payments he would have made on his mortgage, with no prejudgment interest. The district court denied the claims for the remaining items of basic consequential damages and declined to gross-up any of the amounts it did award. The district court also denied Mr. O'Toole's claim for the lost earnings from his SIP funds. Mr. O'Toole appealed.

In O'Toole III, we affirmed in part and reversed in part the district court's decision. We affirmed the district court's decision denying Mr. O'Toole's claim for moving expenses during his

second year in Los Alamos. We reversed and remanded for the district court to reconsider the following issues: (1) the lost mortgage interest deduction; (2) lost earnings from the SIP and earnings on those earnings; (3) prejudgment interest on the $2,000 award for lost principal; and (4) whether Mr. O'Toole was entitled to gross-up on his damages.

On remand, the district court ordered the parties to file briefs addressing the remaining issues in the case. The district court then entered judgment in favor of Mr. O'Toole in the amount of $48,817.02, which reflected awards for the lost mortgage interest deduction and lost SIP earnings. The district court denied prejudgment interest on the $2,000 award for lost principal and declined to gross-up the amounts it awarded. Mr. O'Toole now appeals for the fourth time.

II. Discussion

Mr. O'Toole challenges three of the four issues the district court decided on remand. He argues that the district court erred in determining the amount of his lost SIP earnings, in refusing to gross-up his damages, and in denying prejudgment interest on the award for lost principal. He does not challenge the district court's decision granting him an award for his lost mortgage interest deduction. Mr. O'Toole also contends that the district court erred in failing to address his argument that he has incurred additional consequential damages arising out of the loss of his tax-deferred 401(k) retirement account.

A. Lost SIP Earnings and Earnings on Earnings

Mr. O'Toole sought an award of consequential damages for lost earnings on the retirement funds he had to withdraw from his SIP to pay for relocation expenses. Specifically, he sought "lost earnings on his stock funds from the date of the SIP withdrawals in 1996 and 1998 until Northrop Grumman paid undisputed relocation expenses in June 2001, and lost earnings on unpaid earnings after that date until the date they are paid." O'Toole III, 499 F.3d at 1223. The district court initially determined that Mr. O'Toole was not entitled to lost earnings on his SIP funds because there was no factual basis to support his claim for an average growth rate of 12% for his SIP funds after 1999.3 In O'Toole III, we remanded Mr. O'Toole's claim for lost SIP earnings with the following instructions: "[t]he court should take judicial notice of proof of earnings after 1999 from Northrop Grumman's website, and should consider whether 12% is a reasonable average for all years for lost earnings and earnings on earnings and whether Mr. O'Toole would have left his money invested in [the U.S. Equity] fund as he asserted." Id. at 1225.

1. The U.S. Equity Fund Determination

On remand, the district court first considered the question of whether Mr. O'Toole would have left his money in the U.S. Equity Fund if his money

had remained in the SIP. Although noting that the question was "inherently speculative," the court found that Mr. O'Toole would have kept his money in the U.S. Equity Fund. Aplt. App., Vol. VI at 1135. This finding was based on the evidence that Mr. O'Toole introduced at trial showing that he had invested in two funds in the SIP—the U.S. Equity Fund and the Equity Growth (Magellan) Fund—from 1996 through 1999. Because the Magellan Fund was ultimately discontinued, the district court agreed with our observation in O'Toole III that "`[i]t seems reasonable to assume that Mr. O'Toole would have left his money invested in [the U.S. Equity Fund] after the other fund in which he was invested was discontinued.'" Id. (quoting O'Toole III, 499 F.3d at 1225). On appeal, Mr. O'Toole asserts that the district court erred in determining that he would have left his investments in the U.S. Equity Fund.

"We review the district court's findings on damages for clear error. To reverse under this standard requires that, based on the entire evidence, we have a definite and firm conviction that a mistake has been committed." O'Toole III, 499 F.3d at 1221 (quotations and citations omitted). Mr. O'Toole fails to cite to any evidence demonstrating clear error. As noted above, the only evidence at trial about Mr. O'Toole's investment history was his testimony that for the years 1996-1999 he invested his retirement savings in two funds, the U.S. Equity Fund and the Equity Growth (Magellan) Fund. Aplt. Supp. App. at 178-79. He did not introduce any other evidence about his investment history or his investment strategy.

Instead, Mr. O'Toole relied on his investment performance in those funds during the 1996-1999 time period to provide the basis for his proposal that the district court use a 12% average rate of return for the subsequent years when his money was no longer in the SIP. Id. at 179-80. Based on the evidence introduced at trial, the district court did not err in finding that Mr. O'Toole would have left his money in the U.S. Equity Fund.

In conjunction with this argument, Mr. O'Toole argues that the district court erred by denying his request for a supplemental hearing to introduce new evidence about his investment strategy and in refusing to consider new evidence attached to his post-trial brief. Mr. O'Toole made the supplemental hearing request in his second post-trial brief and also attached additional evidence about his investment strategy as exhibits to the brief. In its memorandum opinion, the district court denied the request to reopen the record for the receipt of more evidence.

Mr. O'Toole argues that the introduction of supplemental evidence is necessary because of the passage of time. But some of the new evidence Mr. O'Toole now wants to introduce could have been introduced at trial in 2003. For example, Mr. O'Toole proposes to offer opinions from his investment advisors regarding the funds in which he likely would have invested in the SIP based on his non-SIP investments during the period from 1999 through 2003. This evidence was available and could have been presented at trial in 2003. Moreover, we did not remand to the district court with directions to reopen the case and retry it.

Although we issued our decision in O'Toole III in 2007--four years after the trial—we directed the district court to base the damage award on judicial notice of the earnings for the Northrop Grumman funds, which was the method Mr. O'Toole requested in his first post-trial brief on damages, see Aplt. App., Vol. V at 953 n.60. Accordingly, we conclude that the district court did not abuse its discretion in refusing to consider Mr. O'Toole's new evidence and in denying his request for a supplemental hearing. See Mason v. Okla. Tpk. Auth., 182 F.3d 1212, 1215 (10th Cir. 1999) (concluding district court did not abuse its discretion in rejecting defendant's attempt to augment the evidentiary record on remand); see Otero v. Mesa County Valley Sch. Dist. No. 51, 628 F.2d 1271, 1272 (10th Cir. 1980) (holding that district court did not err in refusing to reopen case and receive additional evidence when we did not remand with directions to do so).

2. Rate of Return for the U.S. Equity Fund

Next, the district court considered what interest rate the U.S. Equity Fund would have yielded. Following our directions, the district court took judicial notice of the proof of earnings for the U.S. Equity Fund from Northrop Grumman's website. The district court then took the ten-year average rate of return for the U.S. Equity Fund as published on the website, which was 4.5%, and used that as the interest rate for Mr. O'Toole's claim. Based on this determination, the district court concluded that Mr. O'Toole's estimate of 12% growth was not a reasonable average interest rate.

Mr. O'Toole contends that the district court erred by using the ten-year average earnings rate for the U.S. Equity Fund from the Northrop Grumman SIP report. He asserts instead that the district court should have used the actual quarter-by-quarter interest rates for the U.S. Equity Fund, which would result in a significantly higher return. Mr. O'Toole illustrates this difference in Table 1 attached to his brief, which shows the calculations using the quarter-by-quarter earnings rates. See Aplt. Br. at 46-47. The quarter-by-quarter rate analysis results in an award of $69,578.47, as compared to the ten-year average rate used by the district court, which resulted in an award of $48,817.02. Compare id. with Aplt. App., Vol. VI at 1136-37. Northrop Grumman concedes that the district court erred in using the ten-year average earnings rate to calculate the U.S. Equity Fund's rate of growth. Northrop Grumman agrees with Mr. O'Toole that his "lost earnings from the retirement plan through the date of the district court's judgment should be calculated . . . on a quarter-by-quarter basis using, for each quarter, the actual earnings rate figures published by Northrop Grumman." Aplee. Br. at 12. Because the district court's ten-year average rate does not yield the same result as calculating the interest on a quarter-by-quarter basis using the actual rate figures published by Northrop Grumman, we agree that the district court erred. Accordingly, we reverse the district court's decision on this issue, and we direct the district court on remand to amend its judgment to reflect the quarter-by-

quarter earnings for the U.S. Equity Fund through the date of the amended judgment.

B. Gross-up on the Damages Awards

Mr. O'Toole contends that the district court erred in declining to gross-up his damages awards to compensate for the taxation of those awards. Although Northrop Grumman opposed grossing-up the damages in its briefing before the district court, it now agrees that it would be appropriate to gross-up all of the SIP related damages. See id. at 7, 22, 23-34. The parties now both agree that grossing up the damages award in the amended judgment would be the correct course. See id.; Aplt. Reply Br. at 10-11. As there is no longer a dispute between the parties on this issue, we need not reach the question of whether the district court erred in declining to gross-up the damages award. Because the parties are in agreement, we will direct the district court on remand to gross-up the damages award in the amended judgment.

C. Loss of Tax-Deferred 401(k) Plan

Mr. O'Toole argues that the district court erred by failing to address arguments he made regarding the amount of damages he should be awarded for no longer having his money in a tax-deferred 401(k) plan.4 But Northrop Grumman asserts that this is a new theory of damages, and that the district court was not obligated on remand to consider this new theory or the accompanying new evidence. We agree.

Mr. O'Toole did not include this theory of damages in his pretrial order, see Aplt. App., Vol. IV at 858-59; or his proposed findings of fact and conclusions of law, see id. at 887-88. Mr. O'Toole did not identify this theory of damages in his testimony at trial. See Aplt. Supp. App. at 143-93 (using demonstrative exhibit and testifying item by item about damages).5 Nor was the theory presented in his first post-trial brief after this court's second remand, see Aplt. App., Vol. V at 941-58, or as part of his appeal in O'Toole III. See 499 F.3d at 1220-21 (identifying damage claims that district court awarded or denied and identifying Mr. O'Toole's contentions on appeal). Accordingly, it was not identified as an issue for the district court to reconsider on remand. See id. at 1222-27.

Mr. O'Toole first raised this theory to the district court in 1998 in his second post-trial brief on remand after O'Toole III. See Aplt. App., Vol. VI at 1043-50. But our directions to the district court on remand did not involve the reopening of the trial or the consideration of new issues. See O'Toole III, 499 F.3d at 1227 ("On remand, the district court should make specific and detailed findings regarding the matters left open by our opinion." (emphasis added)). Accordingly, the district court did not abuse its discretion in declining to address this new theory of damages. See Mason, 182 F.3d at 1215; Otero, 628 F.2d at 1272.

D. Prejudgment Interest on Award for Lost Principal

Mr. O'Toole sought consequential damages for the one-year delay in his ability to purchase a home in the form of lost principal payments that he would have made, if he had been able to purchase a home. Relying on Mr. O'Toole's mortgage payments once he did purchase a home, the district court concluded that this lost principal would amount to approximately $2,000. See Aplt. App. at 993, Vol. V. The district court awarded this amount without prejudgment interest, but did not offer any explanation for this part of its decision. See id. In O'Toole III, we noted that it was difficult to review the district court's exercise of discretion on this claim because the court gave no explanation for denying prejudgment interest. See 499 F.3d at 1226. Accordingly, we remanded this claim "for further elaboration." Id.

On remand, the district court explained that the $2,000 award:

was premised on actual mortgage payments which the plaintiff made at a later date when he did purchase a house. The amount was not in any way liquidated or settled at the time the plaintiff purchased his home in 1998, and of course, we have no evidence as to what he actually would have paid during the period of 1997-1998, resulting in an increase in the equity in his home. As this was essentially an estimate based upon subsequent events, the Court concluded that it would be unfair to grant the plaintiff prejudgment interest on that amount.

Aplt. App., Vol. VI at 1138.

Although Mr. O'Toole contends that the district court erred in denying him prejudgment

interest on this claim, we will uphold a district court's decision denying an award of prejudgment interest unless the district court abused its discretion. See F.D.I.C. v. Rocket Oil Co., 865 F.2d 1158, 1160 (10th Cir. 1989). We see no abuse of discretion in the district court's decision declining to award prejudgment interest on the award for lost principal. See id. and n.1 (explaining that district court has broad discretion in deciding whether to grant prejudgment interest and noting that under this standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances").

III. Conclusion

The judgment of the district court is AFFIRMED in part and REVERSED and REMANDED in part. On remand, the district court shall enter an amended judgment in favor of Mr. O'Toole that (1) awards damages based on the quarter-by-quarter earnings rate for the U.S. Equity Fund through the date of the amended judgment; and (2) grosses-up the damages award consistent with the applicable tax rates.

Notes:

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore

ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1. In Mr. O'Toole's proposed findings of fact and conclusions of law, he identified fifteen categories of consequential damages to which he was allegedly entitled. See Aplt. App., Vol. IV at 887-88.

2. "'Gross-up' is the name given to an increase in the damage award to offset the taxes that will be payable on the award." O'Toole III, 499 F.3d at 1226.

3. Mr. O'Toole was laid off from his employment at Northrop Grumman in 1997. He withdrew all of the funds from his SIP by the end of 1999.

4. Mr. O'Toole relies on the Seventh Circuit's decision in *Oddi v. Ayco Corp.*, 947 F.2d 257 (7th Cir. 1991), to support this theory of damages. See Aplt. Br. at 37.

5. Although the demonstrative exhibit is not part of the record, there is another exhibit titled "Reimbursement to Joseph A. O'Toole" that appears to track most of the damages identified in the demonstrative exhibit. Compare Aplt. Supp. App. at 143-93 with Aplt. App., Vol. III at 837-38.

10TH CIRCUIT ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOSEPH O'TOOLE,
Plaintiff - Appellant,

v. No. 09-2018

NORTHROP GRUMMAN CORP.,
Defendant - Appellee.

ORDER

Before MURPHY, McKAY, and BALDOCK, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court,
ELISABETH A. SHUMAKER,
Clerk